presumptively pro-competitive and qualify for expedited treatment. All applications that qualify for streamlining should be approved in 14 days upon public notice. Further, the Commission should, as it does in the international Section 214 context, refuse to entertain petitions to deny.[35] As a safety net, however, the Commission could allow Staff to pull out of the streamlining queue those few applications that "raise extraordinary issues suggesting a need for public comment,"[36] such as those that still require analysis under the ECO test because they involve applicants with market power in a non-WTO destination market seeking to serve a home country route.[37] This regime will dramatically decrease existing regulatory entry barriers while at the same time preserving the Commission's flexibility to protect the public interest.

A. The *Notice*'s Regulatory Scheme Cannot Be Predicated On The Claim That Submarine Cable Operators Do Not Have Sufficient U.S. Cable Landing Stations And Backhaul Options

The Commission should expressly reject any regulation based on the notion that AT&T, Concert, or any other carrier can exercise market power over submarine cable operators because of their control of U.S. cable landing stations or backhaul facilities. In the *AT&T Int'l Non-Dominance Order*, the Commission found that AT&T could not exercise market power in the international services market because of the existence of numerous facilities-based competitors and relatively low barriers to entry.[38] Sprint moved for reconsideration of that Order on the ground that, while "there is a sufficient supply of submarine cable capacity," AT&T could use its

[35] *International Section 214 Order* ¶ 22.

[36] *Id.* ¶ 16.

[37] *See Foreign Participation Order* ¶ 130.

[38] *AT&T Int'l Non-Dominance Order* ¶¶ 48-51.

"bottleneck control over cable landing stations" to impede international competition.[39] Based on these assertions, Sprint asked the Commission to impose "regulatory obligations" similar to those proposed in the *Notice*.[40]

The Commission rejected Sprint's claim. In doing so, the Commission made express findings of fact that "owners of a submarine cable can choose to land the cable at any one of several cable landing stations" and that the overwhelming majority of recent cable stations were not owned by AT&T.[41] Beyond observing that there was no reason to believe that cable landing stations were "bottlenecks," the Commission further recognized that arrangements regarding cable station access were "contractual" matters, and disputes regarding such access are resolved (in the case of open investment cables) by a majority of the owners, not the landing station operator.[42]

The Commission made similar factual determinations in its orders addressing the proposed merger of British Telecommunications PLC ("BT") and MCI and the subsequent merger of MCI and WorldCom. Although, the Commission found it necessary to analyze allegations that BT could "raise rivals' costs" using its control of cable landing stations and backhaul facilities in the United Kingdom – a claim that it ultimately rejected[43] – it determined that no scrutiny at all was required at the U.S. end. Indeed, the Commission observed that

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[39] *AT&T Int'l Non-Dominance Recon. Order* ¶ 25.

[40] *Id.*

[41] *Id.* ¶ 26.

[42] *Id.*

[43] Memorandum Op. and Order, *The Merger of MCI Communications Corp. and British Telecom* PLC, 12 FCC Rcd. 15351, ¶¶ 163-71 (1997) ("*BT-MCI Merger Order*").

merger opponents offered *no* evidence or theory that would even purport to show that "either BT or MCI possesses or exercises market power in any U.S. input market" or could "obtain market power in any such input market."[44]

When GTE attempted to supply these arguments and evidence in the MCI-WorldCom merger proceeding, the Commission again rejected them. The Commission made express factual findings that "the appropriate geographic market for backhaul is regional" and that there is no evidence that "the combined entity, either unilaterally, or in concert with others, would have the ability to exercise market power in the U.S. backhaul market."[45] The Commission found that barriers to entry were sufficiently low that even if the MCI-WorldCom were to attempt to raise prices for backhaul, that would simply shift customers to alternative backhaul providers.[46]

Most recently, the Commission reaffirmed these precedents in the *AT&T-BT JV Order*. There, the Commission expressly rejected the contention that AT&T (or any carrier) controlled "bottleneck" inputs necessary for terminating international traffic, finding that:

> there are many alternatives to AT&T for termination of traffic in the United States. [Carriers] may terminate traffic with many facilities-based carriers in the U.S.; it may terminate traffic via ISR at very low rates; and it may build its own facilities in the U.S. and self-correspond. Given the level of competition . . . and the availability of ISR, it is highly unlikely that the joint venture could

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[44] *Id.* ¶ 163 n.224.

[45] *MCI-WorldCom Merger Order* ¶ 115.

[46] *Id. See also id.* ¶ 118 ("We conclude that the merger likely will not have an anticompetitive effect in any relevant international input market. The combination of WorldCom's and MCI's facilities, bot current and planned, is unlikely to be sufficient to allow the combined entity to exercise market power given the low barriers to entry and substantial amount of non-MCI WorldCom capacity becoming available.").

successfully maintain prices to terminate traffic in the United States that are above-cost . . . .[47]

And in Paragraph 100 of that Order the Commission made clear this finding applied with full force to access to cable landing stations. There, it rejected the claim advanced by Sprint that AT&T had "bottleneck control over cable landing stations in the U.S." and could use its "position as a cable station owner to benefit itself at the expense" of the carriers landing traffic at stations it owned.[48] Rather, just as it held in the *AT&T Int'l Non-Dominance Recon. Order*, the Commission observed that disputes regarding cable landing access between consortia cable co-owners were mere "contractual" matters "to be resolved in accordance with procedures established in the consortia cables' Construction and Maintenance Agreement."[49]

Finally, the Commission's consistent findings are confirmed by the most recent market data. There are now literally hundreds of carriers providing both long distance and international services, many with their own facilities.[50] Since AT&T has been declared non-dominant for domestic long distance services, its market share has fallen from approximately two-thirds to a little more than one-third.[51] AT&T's international market share has suffered a corresponding drop.[52] This level of competition is plainly inconsistent with any claim that a few large carriers control the U.S. inputs necessary to provide competitive international services.

[47] *AT&T-BT JV Order* ¶ 64. *See also AT&T-BT JV Order* ¶¶ 47-51 (finding low barriers to entry into "global seamless services" market).

[48] *Id.* ¶ 100.

[49] *Id.*

[50] Federal Statistics of Communications Common Carriers, Tables 2.1, 3.6 (Aug. 11, 2000).

[51] *Id.*, Table 1.5 (Aug. 11, 2000).

[52] *Id.*, Table 3.5.

B. The Approach Taken In The *Notice* Would Do Little To Open Closed Foreign Markets To Competition And Is Foreclosed By The *Foreign Participation Order*

Because of the huge expansion of third country routing opportunities for WTO Member country carriers following the WTO Agreement, refusing to license cables that would land in "closed" WTO markets is likely to do little to get those countries to open their markets to competition. As the Commission noted in the *Foreign Participation Order*, "[b]ecause 52 countries committed to granting market access for international services, alternative routing options will almost always be available."[53] And inasmuch as the relevant markets are regional, monopoly WTO countries can accommodate the demand for traffic to the U.S. simply by routing that traffic through third countries, such as Canada. U.S. carriers would predictably respond to such regulation by either landing cables in other WTO countries that would pass muster under such review and using alternative terrestrial routing facilities to reach the ultimate destination market or by expanding capacity on existing cables that land in such markets. The result would be to reduce the attractiveness of the U.S. as a landing point for cables and as a global telecommunications network hub.

In all events, conditioning the availability of streamlined procedures on foreign market access conditions would mark an impermissible departure from the nondiscriminatory treatment of WTO Member countries the Commission has followed since the *Foreign Participation Order*. The Commission emphasized in that Order that "Article II of the GATS requires WTO Members to accord 'service and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country.'"[54] It further noted that

[53] *Foreign Participation Order* ¶ 94.

[54] *Id.* ¶ 40.

"[a]dopting a policy that limits access to the U.S. market by telecommunications carriers purely based on the existence or quality of a country's commitment would be viewed by many WTO Members as a violation of the GATS."[55] The Commission emphasized that this Most-Favored-Nation ("MFN") obligation is "[t]he most important of the general obligations and disciplines that apply to all WTO Members" and that it applies "no matter what specific commitments a WTO Member has made."[56]

Accordingly, in the *Foreign Participation Order*, the Commission eliminated the ECO test for cable landing license and Section 214 applications for carriers from WTO Member countries. "The ECO test required, as a condition of foreign entry into the U.S. market, that there be no legal or practical restrictions on U.S. carriers' entry into the foreign carrier's market."[57] In its place, the Commission adopted "new open entry policies to applications to land and operate submarine cables from WTO Member countries in the United States."[58] Cable landing license applications filed by foreign-owned companies from WTO Member countries are now evaluated "under a strong presumption that the application should be granted."[59] Further, the Commission found that, following the WTO Agreement, it is neither "necessary or

[55] *Id.*

[56] *Id.* ¶ 37. *See also* GATT Secretariat, Group of Negotiations on Services, MTN.GNS/W/164, *Scheduling of Initial Commitments in Trade in Services, Explanatory Note*, at 5 (Sept. 3, 1993) ("The m.f.n. obligation requires that the most favorable treatment actually accorded in all sectors, whether the subject of a commitment or not, must also be accorded to all other Members.").

[57] *Foreign Participation Order* ¶ 5.

[58] *Id.* ¶ 93.

[59] *Japan-US Cable Order* ¶ 20.

appropriate to engage in the detailed, in-depth analysis of foreign markets that the ECO test required."[60]

In sharp contrast, the *Notice* would effectively impose an ECO-like threshold for streamlining applications for cables that land in WTO Member countries and subject foreign market access conditions to Commission review. And as such, this review would raise considerable concern that the U.S. would be violating its MFN obligations.[61] Indeed, the MFN concerns likely to be raised would be highlighted by the apparent inability of a cable serving a closed WTO market to qualify for streamlined treatment under any of the three proposed criteria.[62]

C. Global Crossing Provides No Support For Regulating Entry Into The Highly Competitive Submarine Cable Market

Global Crossing's arguments cannot support a departure from this precedent. Like the *Notice*, Global Crossing too has claimed that foreign-end competitive concerns require the Commission to restrict entry into the submarine cable market[63] – although Global Crossing's

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[60] *Foreign Participation Order* ¶ 29. The Commission further noted that any continued "in-depth, fact-intensive analysis of the applicant's market" would "set a poor example to those countries that the U.S. government has urged to open their markets and could damage U.S. relations with our trading partners by creating a perceived barrier to entry." *Id.* ¶ 42.

[61] *Id.*¶ 42.

[62] Most WTO Member countries prohibit or limit market access and therefore do not allow collocation at cable stations or the provision of backhaul services by U.S. carrier affiliates. *See* Report on Int'l Telecommunications Mkts. 1999 Update, DA 00-87, at 6 & Att. 3 (Group A, Group B) (Jan. 14, 2000) (only 25 WTO Member countries made full market access commitments in basic telecommunications services, and 46 have made limited commitments). In fact, 66 of the 137 WTO Member countries retain monopolies in international services and prohibit all market access to provide these services.

[63] *Notice* ¶¶ 14, 18.

preferred regulations go far beyond those proposed in the *Notice*. The *Notice* asks for comment on Global Crossing's broadside attack on open investment cables and its proposed "structural" regulations.[64] As explained below, and by Professors Ordover and Willig, Global Crossing's speculative theories – which have to date been supported with no evidence – do not justify the entry regulation proposed in the *Notice* and certainly do not support the more draconian ownership and other restrictions Global Crossing has advocated.

1. Global Crossing's Foreign End Arguments Do Not Provide a Basis for the *Notice*'s Proposed Regulations

Global Crossing advanced two related arguments regarding the ability of foreign monopolists to use control over "essential" inputs to impede competition in the submarine cable market by discriminating among the participants in that market. *First*, Global Crossing has contended that dominant foreign carriers will attempt to "cluster" their U.S. carrier correspondents on cables in which they operate the landing stations.[65] *Second*, Global Crossing has asserted that that dominant foreign carriers have the incentive to "foreclose" cables that compete against those cables in which these dominant foreign carriers have an ownership interest.[66] Both contentions are specious.

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[64] *Id.* ¶ 37.

[65] According to this theory, a foreign carrier would prefer that carriers use cables in which it operates the landing station so that the foreign carrier can charge these other carriers supracompetitive rates for landing. Clustering is achieved, not by denying rivals access to landing stations, but by refusing to enter into "correspondent relationships" with carriers. Thus, Global Crossing asserts, unless carriers can reach an operating agreement with the foreign country's dominant carrier, they cannot compete because they need access to the return traffic that dominant foreign carrier provides to reduce their effective termination costs. Affidavit of Andrew Joskow ¶ 42 (attached to Response of Global Crossing Ltd., File No. SCL-LIC-19981117-00025 (March 15, 1999)).

[66] According to this theory, dominant foreign carriers control the backhaul facilities "necessary" for termination of traffic coming off a submarine cable. Thus, Global Crossing predicts that (continued . . .)

Clustering. This argument has no applicability in the Internet age in which the overwhelming majority of new submarine cable circuits are required for Internet, data and other traffic carried on private line circuits that is exempt from the settlement process and has never earned proportionate return.[67] AT&T and Concert estimate that *more than 95%* of new submarine capacity requirements are for private line circuits rather than International Message Toll Service ("IMTS") traffic.[68] Thus, as Mr. McInerney explains, new planning systems do not ordinarily take IMTS traffic into account when planning new systems.[69]

This is confirmed by Commission statistics showing that, even before the onset of the huge recent upsurge in demand for Internet capacity, only 17% of new active international submarine circuits from 1997-1998 were IMTS circuits.[70] Moreover, industry experts estimate

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(. . . continued)
dominant foreign carriers will deny access to backhaul to submarine cables that compete with the cables in which it has ownership interests, the dominant carrier will be able to shift traffic away from the rival and onto its cable. Reply of Global Crossing Ltd., File No. SCL-LIC-19981117-00025, at 15-16 (Jan 26, 1999).

[67] Historically, IMTS traffic was moved across international boundaries pursuant to "correspondent relationships." The U.S. carrier would have an ownership interest up to the midpoint of the cable, whereas the foreign carrier would own the other half. The carriers would thus theoretically "hand-off" traffic to each other at this point. The rates each carrier charged the other for terminating the traffic were determined by the international settlement rates. Further, the foreign carrier would return traffic in proportion to the traffic delivered by the U.S. carrier. The terms of the correspondent relationship are embodied in a document called an "operating agreement." *See generally* Report and Order and Order on Recon., *1998 Biennial Regulatory Review Reform of Int'l Settlements Policy and Associated Filing Requirements,* 14 FCC Rcd. 7963, ¶¶ 7-20 (1999) ("*ISP Reform Order*").

[68] McInerney Dec. ¶ 10.

[69] *Id.*

[70] 1998 Section 43.82 Circuit Status Data, Table 2 (Dec. 1999). Since 1998, all of these trends have continued at an accelerating pace with the increasing Internet-fueled global demand for private line capacity. *See* Aaron Patrick, *Telco's Little Battler Takes On The Big Boys,* Australian Fin. Rev., June 17, 1999, at 26 (1999 WL 19332125); George Gilder, *Telecosim*
(continued . . .)

that data traffic will become 25 times greater than voice over the next five years, accelerating this trend still further.[71]

Thus, even if every incumbent foreign firm announced that it would enter into correspondent relationships only with those carriers that used the submarine cables that they preferred, the vast majority of the international transport traffic would remain open to those carriers that would decide to use different cables. And knowing this, incumbent foreign firms would have no incentive to undertake the strategy posited by Global Crossing because it would simply shift traffic onto private lines operated by their competitors (including, in an increasing number of countries, U.S. firms that have been authorized to enter the foreign market).

Global Crossing's argument is also both speculative and unfounded even for the very small and fast shrinking share of undersea circuits carrying IMTS traffic to which its argument could apply.[72] Foremost, as the Commission has made clear, operating agreements are not bottleneck inputs. "Generally, U.S. carriers are able to obtain operating agreements or establish alternative arrangements to provide international services."[73] The Commission has repeatedly found that multiple U.S. carriers have operating agreements to nearly all countries and that U.S.

(. . . continued)
Paradigm Party, Forbes, Aug. 24, 1998, at 94 (1998 WL 12989862); *Corning Turns Over New LEAF*, Communications Today, October 29, 1998 (1998 WL 17661569).

[71] *See* The Economist, Mar. 13, 1999, at 82.

[72] *See* Ordover-Willig Dec. ¶¶ 70-74.

[73] *MCI-WorldCom Merger Order* ¶ 117.

carriers will be able to obtain operating agreements from new entrants and incumbent carriers as a result of the market access commitments made under the WTO Agreement.[74]

U.S. carriers may also take advantage of these lower foreign entry barriers by establishing their own affiliates and terminating their own traffic through self-correspondence arrangements. The Commission has further encouraged U.S. carriers to enter into commercial arrangements with new entrant carriers in foreign markets by removing the ISP and related filing requirements from all foreign carriers that lack market power.[75] A significant element in that decision was the Commission's desire to encourage competition by "[r]emoving the regulatory link between the inbound and outbound traffic markets."[76]

In addition, the factual premise of the Global Crossing argument – that settlement rates are well-above termination costs and therefore carriers without proportionate return traffic are at a significant competitive disadvantage – is becoming increasingly less valid both due to the success of the policies the Commission adopted in its *Benchmarks Order* and because foreign markets have become increasingly more competitive as a result of the WTO Agreement. As more and more countries adopt benchmark settlement rates, many reduce rates to even lower

[74] *AT&T-BT JV Order* ¶ 50; *AT&T Int'l Non-Dominance Recon. Order* ¶ 18; *MCI-WorldCom Merger Order* ¶ 117, n.339; *Foreign Participation Order* ¶ 94. *See also TeleGeography 2000* (44 countries had two or more international carriers as of July 1999, up from 23 countries with two or more carriers in July 1997. Twenty-six countries in July 1999 had 10 or more international carriers.).

[75] *ISP Reform Order* ¶ 21. In addition to seeking to remove these "unnecessary regulatory burdens," *id.*, the Commission was concerned that public filing requirements for these arrangements may exert a "chilling effect," *id.* ¶ 28.

[76] *Id.* ¶ 25.

levels, and ever-increasing amounts of U.S. inbound traffic is terminated at cost-based rates, the significance of return traffic is greatly diminished.[77]

Finally, the Commission need not rely simply on fundamental principles of economics to evaluate Global Crossing's assertions. They can also be tested empirically. In the Japan-US cable proceeding, Global Crossing argued that if the Japan-US cable were approved, KDD would refuse to do business with PC-1 in order to force carriers to "cluster" on the Japan-US Cable, in which KDD owned a 4.1% ownership interest and operated one of the Japanese landing.[78] In a January 5, 2000 press release, however, Global Crossing announced that KDD had bought $100 million in capacity on Global Crossing's cables, including PC-1.[79]

Foreclosure. Global Crossing's "foreclosure" theory also provides no basis for the *Notice*'s proposed regulations. First, and most fundamentally, the foreign carrier would need to have a complete backhaul monopoly in order to have the ability to undertake such a foreclosure strategy. Quite obviously, if there is competition in the foreign-end backhaul market, there is no ability for any carrier to impede entry by submarine cables. If one carrier refuses to provide backhaul service to carriers using a particular submarine cable (or provides poor service), they can simply turn to alternative backhaul providers.[80] For example, Global Crossing, while

[77] The reduced significance of return traffic at lower settlement rates is also recognized by the Commission's authorization of International Simple Resale arrangements – which are exempt from proportionate return requirements – once settlement rates reach benchmark levels, and its exemption of all traffic from proportionate return once settlement rates are 25 percent below benchmark levels. *Id.* ¶¶ 13, 54, 61-62.

[78] Response of Global Crossing Ltd., File No. SCL-LIC-19981117-00025, at 25-27 (March 15, 1999).

[79] *See* http://www.globalcrossing.com/pressreleases/pr_010500.htm.

[80] *See* Ordover-Willig Dec. ¶¶ 75-76.

claiming that the Japanese market is monopolized by NTT/KDD, was able to arrange for termination of its traffic by competitive carriers.[81] Indeed, as noted, KDD is a carrier on Global Crossing's PC-1 cable.

But even where such monopolies truly exist, Global Crossing's theories are irrelevant. It would be pointless to deny landing licenses to cables serving those countries because of the absence of backhaul competition and competitive cable landing arrangements. Where only the monopoly carrier may lawfully operate facilities in the foreign country for traffic origination and termination, U.S. carriers can make no use of arrangements for collocation and self-provision of backhaul at foreign cable stations. All U.S. carrier arrangements are with the foreign monopoly carrier, with all traffic handed-off to the foreign monopoly carrier mid-ocean and terminated at the foreign end subject to settlement rates negotiated with that monopoly carrier.[82] And while the dominant foreign carrier would have an incentive to exploit its position to charge excessive rates for call termination under these operating agreements, as explained below in Part II.D, the Commission's existing conduct regulations already protect U.S. carriers from such longstanding potential abuses.

Second, the carrier that controls the foreign backhaul facilities would need to have a large ownership in a submarine cable in order to have any incentive to undertake this foreclosure strategy.[83] That is because the foreign carrier would generally want as much traffic terminating

[81] Supplemental Comments of Japan-US Cable Network, File No. SCL-LIC-19981117-0025, at 21-25 (March 8, 1999).

[82] The Commission addresses competitive issues raised by foreign monopolists through conduct regulations that prevent the foreign monopolist from leveraging its market power. *See infra* Part II.D.

[83] Ordover-Willig Dec. ¶ 77.

over its system as possible. Discriminating against a particular submarine cable's traffic will lower overall demand for its backhaul services. Unless the foreign carrier has significant ownership interest in a cable, it is more likely to lose revenues than gain revenues from such a "foreclosure" strategy.[84]

As noted above, the Commission recognized precisely this point in the *International Section 214 Order*. There, the Commission found that no significant competitive issues were raised by a foreign carrier owning less than a 25% interest in a domestic carrier because even a foreign carrier with market power would "rarely [have] sufficient incentive to discriminate in favor of the affiliated carrier."[85] AT&T and Concert are unaware of any recent or planned open investment submarine cable landing in the U.S. in which a dominant foreign carrier has more than a 25% ownership interest. Thus, the factual predicate for Global Crossing's foreclosure strategy is missing.

2. Global Crossing's Claims that Open Investment Cables Facilitate Collusion Are Specious

Global Crossing's attacks on open investment cables fare no better. However, before addressing the specifics, it is important to put Global Crossing's argument in context. Generally speaking, open investment cables are cost-sharing arrangements with an open ownership structure in which any carrier that wants to take an ownership interest may do so. Owners of open investment cables generally build capacity as a cost-based input to the telecommunications services that they sell. Although the owners cooperate in the construction and maintenance of

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[84] *Id.*

[85] *International Section 214 Order* ¶ 32.

the cable, they generally have full control over the capacity that they own and make decisions regarding use and sale of that capacity independently.[86]

Global Crossing, on the other hand, is one of the increasing number of entities that operates closed investment cables. Global Crossing (like other closed investment cable entities) owns and operates the cable and in turn leases the capacity that it owns to other carriers, while restricting the ability of the leasing carriers to resell the leased capacity. Closed investment cable operators such as Global Crossing seek to maximize profits by leasing capacity to carriers. On the other hand, carriers generally do not participate in open investment cables to make money by selling capacity to other carriers but, as noted, instead use that capacity as an input for telecommunications services that they provide.[87]

Hence, while Global Crossing claims that the fact that most open investment cables are owned by several competing carriers will facilitate collusion,[88] it is precisely this broad ownership structure that ensures that collusion is not likely. It is textbook economics that coordinating conduct among as many carriers as are owners on a typical open investment cable is unlikely.[89]

This is particularly so because of the different interests among open investment cable owners.[90] Some owners will have no capacity other than in the open investment cable while

[86] McInerney Dec. ¶ 42.

[87] *Id.* ¶ 40. There is however, generally no restriction against resale of capacity by owners on an open investment cable. Thus, entities can often purchase interests in open investment cables for the purpose of leasing that capacity to other carriers. *Id.* ¶¶ 42, 45.

[88] *Notice* ¶ 37.

[89] Ordover-Willig Dec. ¶ ¶ 52-58, 111

[90] *Id.* ¶¶ 53, 56.

others will have lots of other capacity in the relevant market. Those carriers with additional capacity can easily cheat by sending their traffic elsewhere. Some owners are vertically integrated back into the interexchange and global business markets at home while others are not. Because the carrier-owners purchase capacity principally for their own use, they generally have an interest in having as much capacity available as they can use. By contrast, those owners that in turn lease the capacity that they own to other carriers could have opposing interests.

Likewise, the open investment cable owners would have no incentive to undertake such a collusive strategy. Proponents of entry regulation in this market have to date been unable to identify a single open investment submarine cable that, even if all the owners acted collectively, has market power. Thus, even if all the owners of any particular cable decided to artificially restrict capacity, they would only succeed in shifting customers to the many other competing cables that exist in each of the regions in which submarine cables are deployed.[91] Further, as explained in the Declaration of Professors Ordover and Willig, there are relatively low barriers to entry into this market.[92] Artificially constraining capacity on a particular cable would simply give closed investment cable operators the opportunity to build a rival cable, the owners of an existing competing cable the opportunity to expand their cable, or the carriers denied capacity the incentive to build their own cable. Such entry would be particularly damaging to the would-be-colluders because the new cable could lock up demand with long term contracts prior to entry.

In this regard, Global Crossing's arguments are extremely ironic. If the owners of a single open investment cable had the ability to exercise market power by undersizing their cable

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[91] *See infra* Part II.C.2.

[92] Ordover-Willig Dec. ¶¶ 44-54.

or not expanding it to meet demand, so too would Global Crossing on its closed investment cables. Indeed, Global Crossing would have even a greater ability to do so because, unlike competitive open investment cables, it unilaterally can determine the capacity available on its cables. Further, because it generally sells capacity rather than using capacity to provide telecommunications services,[93] Global Crossing would directly benefit from such a strategy.

Global Crossing therefore has it precisely backwards. As Professors Willig and Ordover explain, it should be no surprise that open investment cables, developed under Commission regulation to prevent competitive abuse, are in fact pro-competitive.[94] Open investment cables permit both small and large carriers to share in the economies of scale that exist for submarine cables. Each owner has full control over its capacity and can sell and/or use its capacity in whatever manner it wants.[95] And, as discussed above, the ownership structure of open investment cables ensures that the owners compete against each other in the services they provide using that capacity.

Likewise, as an owner of an open investment cable, a carrier can convey its interest and has a say in if and when that cable is expanded. This stands in stark contrast to closed investment cables. The closed investment owner determines if and when a capacity will be expanded, which may (or may not) coincide with the business plans of the existing carrier-

[93] Presumably, Global Crossing uses a small amount of the capacity it owns for international services provided by Frontier, the long distance carrier it recently purchased. Thus, to the extent Global Crossing's proposals are designed for force carriers to lease capacity from closed investment cables such as those operated by Global Crossing, these carriers would be put at a competitive disadvantage with Frontier, who effectively obtains access to Global Crossing's cables at cost.

[94] *Id.* ¶ 55.

[95] *Id.* ¶¶ 55-56.

lessees. Further, closed investment cables typically limit the ability of carriers to transfer or sell their leasehold interests.[96] This is done to prevent carriers that lease large amounts of capacity on a closed investment cables to become "resellers" because such resale would directly compete with the capacity that the closed investment cable's owner itself is marketing to smaller carriers.

Because of these considerations, the Commission has for over 35 years *required* the inclusion of all interested U.S. carriers in common carrier cable consortia. In its 1964 authorization, the Commission ordered that TAT-4 "should be owned jointly, and should be authorized in the name of all of the U.S. oversea telecommunications entities, both record and voice, which desire to participate in such ownership."[97] Since that time, the Commission authorizations of common carrier open investment cables have routinely required the provision of circuits to new U.S. carriers and routinely provided for the reallocation of U.S. carrier interests to accommodate new U.S. carriers.[98] The Commission has even applied this policy to open investment, non-common carrier cables. In approving the China-US cable, the Commission stated that "we note that ownership of the CHINA-US CN . . . has been made available to all interested parties. . . . Therefore, based on the pricing and ownership structure of

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[96] McInerney Dec. ¶ 45.

[97] Memorandum Op. and Order, *American Tel. & Tel. Co.*, 37 F.C.C. 1151, 1161 (1964).

[98] *See, e.g.*, Memorandum Op., Order and Authorization, *American Tel. & Tel. Co., et al.*, 98 F.C.C. 2d 440, 453 (1984); Memorandum Op., Order, Authorization and Certificate, *American Tel. & Tel. Co., et al.*, 3 FCC Rcd. 6073, ¶ 24 (1988); Memorandum Op., Order and Authorization, *American Tel. & Tel. Co., et al.*, 8 FCC Rcd. at 4815 (1993); Memorandum Op., Order and Authorization, *AT&T Corp., et al.*, 14 FCC Rcd. 13436, ¶ 22 (1999) (*COLUMBUS-III Order*).

this cable system, there is no reason to believe that this is or will become a bottleneck facility, even on the U.S.-China route."[99]

Indeed, in the 1996 *AT&T International Non-Dominance Order*, the Commission "welcome[d] AT&T's voluntary commitments" regarding submarine capacity.[100] These included commitments to "act as a broker for U.S. carriers seeking to obtain cable capacity on an [Indefeasible Right to Use] basis from the common reserve of open investment cable systems that land in the U.S. in which AT&T is an owner" and to "establish a committee with the Eastern and Western cable owners to discuss the long-term open investment cable planning configurations for the Pacific Ocean, Americas, and Atlantic Ocean regions."[101] The Commission stated that "AT&T's commitments will do much to alleviate the parties' concerns regarding submarine cable capacity."[102]

3. The Commission Should Reject Global Crossing's Proposed Restrictions on Open Investment Cables

Global Crossing proposes that the Commission should only approve a submarine cable landing license application if the "landing parties on the U.S. end of the cable do not have a combined share of more than 35 percent of active half circuits . . . on the U.S. side of the route served by the cable."[103] Such a restriction would be patently anticompetitive in two independent respects.

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[99] *See AT&T Corp., et al.*, 13 FCC Rcd. 16232, ¶14 (1998).

[100] *AT&T Int'l Non-Dominance Order* ¶ 63.

[101] *Id.* ¶ 64.

[102] *Id.* ¶ 63.

[103] *Notice* ¶ 37.

First, by its plain terms, any carrier (or group of carriers) would be precluded from taking an ownership position in any new cable if that carrier (or group of carriers) controlled more than 35% of the existing capacity on a route. Indeed, Global Crossing's proposal would even preclude a carrier (or group of carriers) with more than 35% of the existing capacity from participating in a project that, once completed, would *reduce* its (or the group's) "market share" to less than 35%. And since large carriers are often the driving force behind new submarine cable projects, this restriction will have the predictable effect of reducing the number of open investment submarine cables deployed in the future.

Second, open investment cables that are built will likely be smaller than they otherwise would, because many carriers that own existing capacity would be excluded to avoid the ownership cap. This in turn means the cables that are deployed may not benefit from full economies of scale that can be obtained from an optimally sized cable.

Unsurprisingly, the impact of Global Crossing's proposal would be to weaken the effectiveness of open investment cables and strengthen Global Crossing's own position. Because Global Crossing's rule would forbid carriers with more than 35% of existing capacity from taking even a *de minimis* ownership interest in a new cable, these carriers could only serve additional demand for their telecommunications services by leasing capacity from closed investment cables like those operated by Global Crossing. Likewise, by ensuring that those cables that can be built are undersized, Global Crossing's proposal would drive up the per-unit costs of capacity on those cables and thereby increase the attractiveness of its competing closed investment cables.

A little history further exposes the extreme nature of Global Crossing's position. None of the previously approved open investment cables, from TAT-4 through TAT-14, would have passed muster under Global Crossing's proposal even though the ability to participate in these cables has been the primary means by which U.S. international carriers have obtained their international transmission capacity – and have developed the world's most competitive international telecommunications market with multiple carriers providing facilities-based service on virtually all international routes.[104]

Although the *ex parte* in which Global Crossing made its proposal does not provide any explanation as to what anticompetitive practices the proposal purports to foreclose, it appears that the proposal is intended to address Global Crossing's "clustering" concerns by ensuring that only a limited number of carriers will be able to invest in any particular cable. But as explained above in Part II.C.1, that argument is both speculative and unfounded – even for the fast shrinking share of undersea circuits carrying IMTS traffic to which its argument applies.[105]

At bottom, Global Crossing's proposal is nothing more than a plea to the Commission to "level the playing field" by handicapping more efficient rivals. The D.C. Circuit, however, has made clear that the Commission may not discriminate against non-dominant carriers in this manner: "The Commission is not at liberty . . . to subordinate the public interest to the interest of

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[104] *See generally AT&T-BT JV* Order ¶¶ 47-51; *MCI-WorldCom Merger Order* ¶¶ 86-99; *AT&T Int'l Non-Dominance Order* ¶¶ 52-65.

[105] Global Crossing likewise cannot claim that its ownership limit is necessary to prevent the exercise of market power by the carriers that participate in open investment cables. Clearly, Global Crossing cannot justify the limit by claiming that a carrier with greater than a 35% "market share" can exercise market power. The Commission declared AT&T to be non-dominant when its market share for many international services was nearly twice that level because of elastic supply and low barriers to entry, *AT&T Int'l Non-Dominance Order* ¶ 37 – factors that are present in the "market" for wet link transport, *see infra* Part III.A. Nor can Global Crossing side-step the competitive analysis employed by the Commission in the *AT&T Int'l Non-Dominance Order* by speculating that open investment cables facilitate "collusion." As explained in detail above in Part II.C.2, the structure of open investment cables ensures that the carriers that participate in those cables vigorously compete in the services that they offer.

equalizing competition among competitors."[106] Rather, the "Commission's statutory duty is to protect efficient competition, not competitors."[107]

It is precisely because of these considerations that the Commission has made clear that its "policy has been and continues to be that private systems succeed or fail on their merits and not through policies that would guarantee . . . use of these systems."[108] And applying that standard, the Commission has rejected all attempts by closed investment cables to deny authorizations to open investment cables in order to obtain a competitive advantage. Thus, for example, in approving TPC-4, the Commission rejected claims by PTC, the owner of a competing closed investment cable, that "established carriers have the ability and incentive to manipulate the availability of facilities and the distribution of traffic" and that grant of the application would "impede competition."[109] The Commission stated: "[w]e have made it clear on several occasions that private cable systems are risk ventures and that we would not guarantee such systems common carrier traffic."[110]

Finally, and in all events, even if the Commission were to accept Global Crossing's flawed premise that some type of ownership limit is necessary to prevent anticompetitive

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[106] *SBC Communications*, 56 F.3d at 1491 (citations omitted). *See also Competitive Telecommunications Ass'n*, 87 F.3d at 531-32; *Western Union Tel.*, 665 F.2d at 1122; *Hawaiian Tel.*, 498 F.2d at 776.

[107] Memorandum Op. and Order, *Bell Atlantic Mobile Sys., Inc. and NYNEX Mobile Communications Co.*, 12 FCC Rcd. 22,280, ¶ 16 (1997).

[108] *Inquiry Into the Policies to be Followed in the Authorization of Common Carrier Facilities to meet North Atlantic Telecommunication Needs During the 1991-2000 Period*, 3 FCC Rcd. 3979, ¶ 79 (1988).

[109] *American Tel. & Tel. Co., et. al*, 4 FCC Rcd. 8042, ¶ 16 (1989).

[110] *Id.* ¶ 30. *See also American Tel. & Tel. Co., et al.*, 7 FCC Rcd 130, ¶ 16 (1992).

conduct by open investment cables, Global Crossing's specific proposal is fundamentally unsound. Global Crossing proposes that the 35% apply to each "point-to-point" route served by a proposed submarine cable.[111] However, Global Crossing concedes – as it must – that its "35% solution" would not apply in the case of competitive, regional routes.[112] That concession is dispositive. As explained below in the discussion of the *Notice*'s proposed "Competitive Route" option, the relevant routes *are* regional, not point-to-point. And, as explained below, each relevant region is highly competitive.

Further, Global Crossing proposes an ownership limit that would be based on *active* circuits.[113] But, as Professors Ordover and Willig explain, all capacity, including unused capacity, is the relevant criterion for competitive analysis in this context.[114]

D. Commission Conduct Regulations And Trade Enforcement Mechanisms Are Adequate To Address Foreign End Concerns In Those Countries That Permit Competition

The better approach to dealing with problems raised by foreign end monopolists is the Commission's existing conduct regulations. Foremost is the No Special Concessions rule. As its name implies, the No Special Concessions rule prohibits all U.S. international carriers from agreeing to accept "special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market."[115] The

[111] *Notice* ¶ 37.

[112] *See id.*

[113] *See id.*

[114] Ordover-Willig Dec. ¶ 111.

[115] 47 C.F.R. § 63.14.

rule sweeps broadly, governing any arrangement "involving services, facilities or functions on the foreign end of a U.S. international route that are necessary for the provision of basic telecommunications services . . . and involves . . . interconnection arrangements, including pricing, technical specifications, functional capabilities, or other quality and operational characteristics, including provisioning and maintenance times."[116] Because submarine cable station access arrangements are interconnection arrangements, they are subject to the No Special Concessions rule, as the International Bureau has recently confirmed.[117]

The International Settlement Policy ("ISP") also prevents dominant foreign carriers from discriminating against U.S. carriers.[118] The ISP "requires U.S. telecommunications carriers to pay nondiscriminatory rates for the termination of international traffic in foreign countries."[119] Because under the ISP dominant foreign carriers cannot play U.S. carriers off against each other, they have an incentive to establish correspondent relationships with as many carriers as they can and thereby to maximize the revenues they earn for terminating international calls in their home countries.

In addition to the No Special Concessions Rule and the ISP, U.S. facilities-based affiliates of foreign dominant carriers are subject to benchmark settlement rate conditions to reduce their ability to engage in predatory price-squeezes and dominant carrier safeguards to prevent anticompetitive conduct benefiting their affiliates.[120] Also, the companion regulations

[116] *Id.* § 63.14(b).

[117] *Telefonica SAM USA, Inc.*, SCL-LIC-20000204-00003, ¶¶ 24-25 (Aug. 10, 2000).

[118] *ISP Reform Order* ¶ 21.

[119] *Id.* ¶ 9.

[120] *Foreign Participation Order* ¶¶ 192-206, 221.

adopted by the Commission in the *Benchmarks Order* have dramatically reduced the rates that a U.S. carrier must pay to foreign carriers for to terminate international traffic in the foreign country.[121] As acknowledged in the *Japan-U.S. Order*, these regulatory safeguards reduce the risk of anticompetitive effects in the U.S. market from submarine cable arrangements involving foreign dominant carriers.[122] But unlike the streamlining criteria proposed by the *Notice*, these rules do not treat countries differently based on the existence, quality or implementation of any foreign market access commitment. Rather than require specific types of access at the foreign end, they limit particular types of anticompetitive conduct by carriers with foreign market power, such as discrimination or high settlement rates that threaten price squeezes and one-way bypass.

The Commission also emphasized in the *Foreign Participation Order* that any failure by other countries to implement their WTO market access commitments should be addressed by U.S. Trade Representative ("USTR") actions under WTO dispute settlement procedures, rather than by Commission limitations on U.S. market entry.[123] Indeed, it was on the basis of this finding that the Commission felt that it was unnecessary to continue to apply the ECO test to entry by carriers from WTO Member countries.[124] And the USTR has made clear that it takes its responsibilities in this area seriously. The USTR has recently begun to press Taiwan on its

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[121] McInerney Dec. ¶ 15.

[122] *Japan U.S. Order* ¶ 34

[123] *Foreign Participation Order* ¶ 39.

[124] *Id.*